

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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In the Matter of )

Implementation of Section 34(a)(1) )  
of the Public Utility Holding Company )  
Act of 1935, as added by the )  
Telecommunications Act of 1996 )

GC Docket No. 96-101

To: The Commission

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**COMMENTS OF  
THE SOUTHERN COMPANY**

The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC's" or "Commission's") rules (47 C.F.R. § 1.415), respectfully submits the following Comments in the above-captioned Notice of Proposed Rule Making ("NPRM").<sup>1/</sup>

**I. STATEMENT OF INTEREST**

1. Southern is a registered holding company under Section 5 of the Public Utility Holding Company Act ("PUHCA") (15 U.S.C.S. § 79(a) et seq.) and it has four operating companies which generate and distribute electric power in the southeast

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<sup>1/</sup> The NPRM in this proceeding was released on April 25, 1996.

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United States.<sup>2/</sup> Southern intends to maintain an ownership interest in companies engaged in telecommunications and related activities<sup>3/</sup> in accordance with new Section 34 of PUHCA as amended by the Telecommunications Act of 1996 (Pub. L. No. 104-104 (1996)) (the "1996 Act") and has filed six applications for FCC determination of exempt telecommunications company ("ETC") status under Section 34.

2. Following FCC determination of ETC status, these entities are expected to participate actively in the market for telecommunications and related services. Accordingly, Southern has an interest in the outcome of this proceeding.

## **II. Introduction**

3. In this NPRM the Commission has proposed procedures to implement the ETC application process, established by Section 34(a)(1) of PUHCA. The FCC has proposed rules which will establish a streamlined procedure for determination of ETC status and which comport with the Congressional intent underlying Section 34. Specifically, the Commission proposes that applications for ETC status will consist of (1) a brief

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<sup>2/</sup> These are Alabama Power Company, Georgia Power Company, Mississippi Power Company and Gulf States Power Company.

<sup>3/</sup> The activities permitted under the 1996 Act are: telecommunications services, information services, other services or products subject to the jurisdiction of the FCC, and products or services related or incidental to these categories.

description of the applicant's planned activities, (2) a sworn statement by the applicant attesting to facts supporting ETC eligibility and (3) certification that the applicant is in compliance with the Federal Anti-Drug Abuse Act. The Commission proposes that the scope of both Agency review and public comment be confined to the issue of whether the applicant meets the statutory requirements for ETC status.

4. In addition the Commission proposes a requirement that applicants for ETC status serve copies of their applications upon the Securities and Exchange Commission ("SEC") and affected state public service commissions. The Commission also proposes that multiple applicants affiliated with a single registered holding company be permitted to file under a single application. Finally, the Commission proposes rules to govern material variation of the facts which underlie the determination of ETC status. With regard to such variations, the rules provide for three alternate options, one of which must be undertaken by an ETC within 30 days of the variation:

- (1) a new application for ETC status,
- (2) a written explanation of why the change does not affect ETC status, and
- (3) notice to the Commission of an intent to withdraw from ETC status.

The Commission indicates that ETCs will have an opportunity to respond in cases where a change is reported by a third party, though this is not expressly stated in the proposed rules.

5. Southern generally supports the FCC's approach, as set forth in the NPRM, and encourages the Commission to adopt the draft rules as proposed.

### III. COMMENTS

I. Southern supports the adoption of the Commission's proposed rules.

6. In general, Southern supports the Commission's proposed rules as an appropriate implementation mechanism for new Section 34 of PUHCA. That section, consistent with the overall deregulatory, procompetitive purpose of the 1996 Act, was designed to remove existing statutory and regulatory barriers to market entry and to promote vigorous, competitive participation by registered holding companies in the market for telecommunications and related services. The Commission's proposed rules generally strike an appropriate balance between the interests of registered holding companies, ETCs, the states, the SEC and the public.

II. The Scope of Public Comments and Agency Review is Appropriately Limited to Whether the Applicant Meets the Statutory Requirements of Section 34 of PUHCA

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7. The FCC has proposed that the scope of public comments on applications for ETC status should be limited to the "accuracy and adequacy of the representations contained in the applications," NPRM at ¶ 13, and that its own review should consist of "whether the application meets the statutory requirements for ETC status" NPRM at ¶ 10. The Commission's proposals in this regard are appropriate.

8. In Section 34, Congress clearly intended to create an uncomplicated mechanism for expeditious entry by register holding companies into the market for telecommunications and related services and products. Section 34 eliminates SEC pre-approval, and all that it previously entailed, of registered holding company involvement in telecommunications and related activities. By placing the sole determination to be made under Section 34 in the hands of the FCC, Congress unambiguously expressed its intention to eliminate extensive review of collateral issues undertaken in the SEC prior approval process. The FCC's sole function is to determine, in accordance with its expertise, whether proposed business activities in fact fall within one of the qualifying categorical definitions in Section 34(a)(1).

9. Further, the FCC's proposal to retain a well defined scope of inquiry for both itself and the public is consistent with Congressional recognition of the need for unfettered access to a highly competitive and dynamic marketplace. The 60 day review period and the presumptive status as an ETC during that period, both established in the Act, clearly indicate that Congress did not intend for the ETC determination process to be a hurdle to entry, such as would occur in the event that other issues were injected into the process. Furthermore, since an ETC remains subject to all regulatory requirements pertinent to the service it is offering, questions as to merits of entry, if any, can be addressed in the context of that approval process, and need not be addressed in the ETC application process.

III. The Commission's proposed rules concerning material variation in circumstances need to be clarified.

10. The Commission has set forth proposed rules concerning notification of material variation in the circumstances underlying the original determination of ETC status. While Southern does not take issue with the general concept, the meaning of "material" is open to different interpretations. This will result in unnecessary uncertainty for ETCs, and could be used by third parties to impede vigorous competition on the part of ETCs through the filing of specious claims concerning material variation. Southern urges the Commission to give more guidance

on the intended meaning of the phrase "material change in circumstance." Southern believes that ETCs should, for example, be able to expand service offerings (for example, adding long haul fiber service to a wireless service it may already be providing) without this being considered in a "material" change in circumstances. Further, Southern encourages the Commission to establish a presumption favoring ETC status in the context of such challenges and to resolve such contentions in the spirit of Congressional intent underlying Section 34.

## **VI. CONCLUSION**

11. The FCC has already successfully administered the process of ETC determination employing principles substantially in accordance with the proposed rules. Southern urges the Commission to build on this success by adopting the proposed rules in their current format.

**WHEREFORE THE PREMISES CONSIDERED,** the Southern Company respectfully request that the Commission act upon its Notice of Proposed Rule Making in a manner consistent with the views expressed herein.

Respectfully submitted,

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